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CLEARINGHOUSE RULE 00-180

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

The commission does not appear to have the authority to modify its definition of “fuel” as proposed in s. PSC 116.03 (4). Chapter PSC 116 sets forth the conditions and procedures for the Public Service Commission (PSC) to review certain increases in electric utility fuel costs in an extraordinary or emergency hearing. Under s. 196.20 (4) (c), Stats., these hearings are limited to review of “an increase in fuel costs . . . of an extraordinary or emergency nature.” Thus, under the plain reading of the statutes, the hearings can only relate to the specified costs of fuel and not to other types of costs.

Since neither s. 196.20, Stats., in particular, nor ch. 196, Stats., in general, define “fuel,” for purposes of s. 196.20 (4), Stats., the PSC may use its rule-making authority to define “fuel” in ch. PSC 116. However, since s. 196.20 (4), Stats., is a successor policy to the commission’s automatic fuel adjustment clause policy, case law interpreting the adjustment clause likely applies to the successor policy to the extent that the Legislature has not modified the applicable statute. In creating s. 196.20 (4), Stats., 1983 Wisconsin Act 27 did not define “fuel,” and thus it is reasonable to apply court interpretations of “fuel” under the adjustment clause to the definition of “fuel” applicable to s. 196.20 (4), Stats.

In *Wisconsin’s Environmental Decade, Inc. v. Public Service Commission* [81 Wis. 2d 344, 260 N.W.2d 712 (1978)], the WED IV case, the Wisconsin Supreme Court ruled that expanded adjustment clauses that included such items as “purchased power,” “fuel,” “labor,” “supplies,” “steam,” “electric expenses” and “supervision” were not authorized by the

Legislature. Building on this decision, the Court of Appeals in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 105 Wis. 2d 457, 313 N.W.2d 863 (Ct. App. 1981), ruled that costs of nuclear fuel, though a nontraditional fuel, is “still a fuel rather than a non-fuel, which was the distinguishing characteristic of the objectionable items included in the expanded adjustment clause rejected in WED IV.” The Court of Appeals also noted that “[b]ecause nuclear fuel is a fuel, it is, like other fuels, not subject to WEPCO’s cost control. This provides a rational basis for treating it like other fuels by including it in an adjustment clause.”

The rule expands the definition of “fuel” to include “other commission-approved plans designed for the reliable provision of electricity,” including retail customer tariffs under s. 196.192 (2) (a), Stats., for voluntary curtailable load, air conditioner load control programs and short-term rental of generating facilities. See the treatment of s. PSC 116.03 (4). While it may be meritorious that the commission establish an expedited hearing procedure for increased costs born by a utility relating to the reliable provision of electricity, the plans specified in the definition of “fuel” may not result in fuel-related expenses and could include nonfuel expenses. Furthermore, the rule does not limit these plans to expenses beyond the utility’s cost control, casting further doubt on the authority for their inclusion in this provision.

2. Form, Style and Placement in Administrative Code

a. The preferred drafting style in specifying a list of items is to include in the introductory material a phrase like “all of the following” or “any of the following.” [See s. 1.03 (8), Manual.] This style was not followed in s. PSC 116.03 (4) (intro.).

b. In the treatment clause for SEC. 4, “are” should be substituted for “is.”

c. The preferred drafting style is to present a definition in the singular form. This style was not followed in the definition of “opportunity sales” in s. PSC 116.03 (5). Also, see current s. PSC 117.03 (14).

d. The phrase “Wis. Adm. Code” should not be included in the reference to ch. PSC 117 in s. PSC 116.03 (5). [See s. 1.07 (2), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

The reference to the definition of “opportunity sale” in s. PSC 116.03 (5) should be to s. PSC 117.03 (14) rather than ch. PSC 117.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The rule contains a number of references to “cumulative fuel costs” or comparable terms. See, for example, ss. PSC 116.03 (3), 116.06 (1) and 116.07 (1). The rule is not clear as to the period covered by these cumulative estimates or costs. The commission should review the use of these terms and modify the rule as necessary to remove this ambiguity.

b. The punctuation between the terms in s. PSC 116.03 (4) (intro.) should be consistent. As amended, the provision has no punctuation or conjunction after “generate electricity” and includes a semicolon after “rate proceeding.”

c. The commission should review the definition of “opportunity sales” in s. PSC 116.03 (5) and the use of this term in s. PSC 116.03 (4) (intro.) to ensure that the application of the term will be consistent and unambiguous. In particular, under s. PSC 116.03 (4) (intro.), “fuel” includes in-state and out-of-state opportunity sales of electricity as determined in a rate proceeding whereas s. PSC 116.03 (5) only applies the rate proceeding requirement to in-state sales. Also, s. PSC 116.03 (4) (intro.) uses the verb “determined” whereas s. PSC 116.03 (5) uses the verb “defined.”

d. In s. PSC 116.03 (5), “out of state” and “in state” should be hyphenated.

e. If the purpose of the amendment to s. PSC 164.04 (1) (a) is to establish that the specified fuel costs will not be considered an emergency increase in the cost of fuel, then this paragraph is potentially ambiguous as an emergency increase in the cost of fuel is a subset of an extraordinary increase in the cost of fuel under one reading of the definitions in s. PSC 116.03 (1) and (3). If the commission intends that par. (a) be interpreted so that the specified fuel costs will not be considered an emergency or extraordinary increase in the cost of fuel, then the paragraph would be clearer if it stated that interpretation directly.

f. Since the rule does not contain any amendment to the text of s. PSC 116.04 (1) (b) 3., the commission should either delete the provision from SEC. 6 or modify the text to include an amendment to this subdivision.

g. As drafted, s. PSC 116.04 (1) (b) 5. is ambiguous, as it is not clear whether “as determined in a rate proceeding” modifies only “opportunity sales” or both “cost effect of known or projected purchases of electricity” and “opportunity sales of electricity.”